

**Before the
Federal Communications Commission
Washington, D.C.**

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In the Matter of)	
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Facilitating the Deployment of)	
Text-to-911 and Other 911 Applications)	PS Docket No. 11-153
)	
)	
Framework for Next Generation 911)	PS Docket No. 10-255
Deployment)	
)	

COMMENTS OF TECHAMERICA

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TechAmerica hereby submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Further Notice of Proposed Rulemaking ("FNPRM" or "Further Notice") in the above captioned proceedings.¹

TechAmerica is the leading voice for the U.S. technology industry, which is the driving force behind productivity growth and jobs creation in the United States and the foundation for the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, TechAmerica is the industry's largest advocacy organization.

TechAmerica's members include: (a) manufacturers and suppliers of broadband networks and equipment; (b) consumer electronics companies; (c) information and communications technology hardware companies; (d) software and application providers; (e) systems integrators; (f) Internet and e-commerce companies; and (g) Internet service providers.

Introduction

TechAmerica welcomes the opportunity to provide the Commission comments in this important proceeding. The development and deployment of Next Generation 911 technologies is certainly of interest to many of TechAmerica's members.² Technological evolution coupled with a strong public interest inherent in viable emergency

¹*In the Matter of Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment*, Further Notice of Proposed Rulemaking, FCC 12-149, PS Docket No. 11-153, PS Docket No. 10-255 (rel. Dec. 13, 2012)("FNPRM").

² See generally *Framework for Next Generation 911 Deployment*, PS Docket No. 10-255, Comments of TechAmerica (Feb. 28, 2011).

communications necessitates that the Commission review how and to what extent industry is meeting consumer needs.

However, upon review of the Commission's FNPRM, TechAmerica is concerned that the Commission may be acting unnecessarily with regard to the possible regulatory treatment of both CMRS carriers and over-the-top ("OTT") third party texting application providers. It is true, as the Commission recognizes that standard SMS-based text messages and OTT texting applications are used by consumers.³ However, to impose text-to-911 regulations on either right now is improper and unnecessary at this time.

At the outset, TechAmerica believes strongly that voluntary agreements between industry and government are a superior alternative to constrictive regulations. In this vein, TechAmerica commends the Commission for working collaboratively with leading wireless carriers to identify a reasonable timetable for the participating wireless service providers' implementation of text-to-911 bounce-back and message-delivery capabilities.

TechAmerica believes the voluntary agreement between the top four wireless providers and public safety organizations suggests that adopting government mandates in this area is not warranted.

Rules requiring CMRS and OTT providers to provide text-to-911 capability would be improper for a variety of reasons, not the least of which is that doing so is beyond the Commission's jurisdiction. With regard to OTT providers in particular, such rules would be technically infeasible, dangerously confusing for users, unnecessary to address

³ FNPRM at ¶¶ 5, 88 n.240.

legitimate emergency-response concerns, and contrary to the Chairman's representation that the Commission will not attempt to regulate Internet applications.

The Commission Should Refrain from Regulating CMRS Providers in this Proceeding Absent Proper Legal Authority

The Commission seeks comment to “refresh the record” with regard to its legal authority to apply comprehensive text-to-911 rules on CMRS providers.⁴ TechAmerica believes that the Commission lacks the proper legal authority and need not impose regulatory mandates on CMRS providers at this time absent a market failure. As the Commission notes, CMRS providers and public safety entities have recently taken “significant steps” towards deploying text-to-911 capabilities.⁵ Indeed, the country's two largest SMS providers, AT&T and Verizon, have stated publicly that they will deploy text-to-911 technology throughout their footprints this year and have already begun to do so.

Further, as the Commission recognizes in its FNPRM, the four largest CMRS carriers, in conjunction with the National Emergency Number Association and the Association of Public Safety Communications Officials, have agreed to deploy text-to-911 service by May 2014 to PSAPs who request the service (“Agreement”).⁶ In light of the strong commitment made by the largest CMRS providers, it remains imprudent for the FCC to codify the Agreement and mandate its application. Thus, as a matter of practicality it is unnecessary for the FCC to impose a regulatory mandate on those CMRS providers.

⁴ See FNPRM at ¶¶ 168-172.

⁵ FNPRM at ¶ 10.

⁶ Id.

The Commission cites Title III of the Communications Act, the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), and its ancillary authority as support for its FNPRM.⁷

For reasons espoused in comments made earlier in this proceeding,⁸ TechAmerica believes the Commission lacks the proper legal authority to impose text-to-911 rules on CMRS providers.

Regulating Text-to-911 Capability for OTT Providers Would Violate Binding Precedent

The Commission also seeks comment on the extent of its jurisdiction to regulate OTT texting application providers.⁹ OTT messaging applications are software apps that run on Internet-enabled devices. The Commission's historical reluctance to regulate such apps is grounded in solid policy considerations: The app economy is intensely competitive, fast-changing, and beyond the Commission's subject matter expertise. The FCC's reluctance to act in this area also is grounded in law. In the FNPRM, the Commission cites various provisions in the Communications Act and CVAA¹⁰ as potential bases for its authority to require text-to-911 capability for OTT providers.¹¹ Neither statute, however, grants the FCC regulatory authority over OTT messaging apps.

⁷ FNPRM at ¶¶ 168-72.

⁸ See *e.g.*, Comments of CTIA at 19-21 (filed Dec. 12, 2011).

⁹ FNPRM at ¶ 171.

¹⁰ Pub. L. No. 111-260, 124 Stat. 2751 (2010).

¹¹ See FNPRM at ¶ 170.

The Commission Lacks Direct Authority in the Communications Act to Regulate OTT Messaging Applications

The FNPRM sets forth a list of potential sources of authority from Title III of the Communications Act, none of which provides the necessary “jurisdictional hook” for requiring OTT messaging apps to comply with text-to-911 rules.

Sections 301, 303(b), 307, and 316 of the Communications Act¹² provide the Commission authority to administer the airwaves by granting radio licenses and regulating radio licensees. Invocation of these sections is unavailing here, as provisioning of OTT messaging apps does not require a license or any other authorization from the Commission.

The rest of the Communications Act provisions listed by the Commission – Sections 303(g),¹³ 303(r),¹⁴ and 309(j)¹⁵ – set forth policy goals for the agency or contain only general directives without specific grants of authority. Congressional statements of policy cannot support extending regulations to OTT messaging apps. As noted by the D.C. Circuit, statements of policy “do not create ‘statutorily mandated responsibilities.’”¹⁶ While “statements of congressional policy can help delineate the contours of statutory authority[,]” they are not delegations of regulatory authority.¹⁷ The Commission

¹² 47 U.S.C. §§ 301, 303(b), 307, 316.

¹³ Section 303(g) directs the Commission to “encourage the larger and more effective use of radio in the public interest.” 47 U.S.C. § 303(g).

¹⁴ Section 303(r) permits the Commission to take actions necessary and proper to discharge its duties. 47 U.S.C. § 303(r).

¹⁵ Section 309(j) directs the Commission to encourage “development and rapid deployment of new technologies, products, and service for the benefit of the public . . . without administrative or judicial delays” and “efficient and intensive use of the electromagnetic spectrum.” 47 U.S.C. § 309(j).

¹⁶ See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir 2010).

¹⁷ *Id.* at 654.

therefore “may not rely on Title III's public-interest provisions without mooring its action to a distinct grant of authority in that Title.”¹⁸ As no such grant exists here, the proposed text-to-911 service rules may not be imposed upon OTT messaging app providers under the Communications Act.

Nor can a grant of authority be found in the public safety mandate in Section 1 of the Communications Act.¹⁹ Section 1 lays out the purposes for which Congress created the Commission, providing insight into how Congress thinks the FCC should exercise its authority. Section 1, however, is not itself a grant of authority. The D.C. Circuit has rejected Commission arguments that this statutory language contains a broad grant, saying “[p]olicy statements are just that—statements of policy. They are not delegations of regulatory authority.”²⁰

The CVAA Does Not Provide Direct Authority to Impose Text-to-911 Requirements on OTT Messaging Application Providers

The Commission also attempts to derive authority from the CVAA. Like the Communications Act, the CVAA contains no grant of authority to allow the Commission to impose the proposed service requirements on OTT messaging app providers.

Section 615c²¹ relates to “the migration to a national Internet-protocol enabled emergency network,” which is not even at issue in this proceeding. Further, Section 615c(c) makes clear that the applicability of any new requirements must be limited to

¹⁸ *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012).

¹⁹ 47 U.S.C. § 151.

²⁰ *Comcast Corp.*, 600 F.3d at 654.

²¹ 47 U.S.C. § 615c.

“providers of interconnected and non-interconnected VoIP services and manufacturers of equipment used for such services.” Congress carefully calibrated the language of Section 615c, taking steps to ensure that the applicability of any rules would be tailored and strategically targeted. OTT messaging app providers are noticeably excluded from this language.

Nor does Section 615c(g) provide the Commission with authority to extend service rules to entities not listed in Section 615c(c). Section 615c(g) allows the FCC to “promulgate regulations to implement the recommendations proposed by the Advisory Committee.” To read Section 615c(g)’s housekeeping provision as a nearly unrestricted grant of new rulemaking authority that Congress elsewhere withheld would be to find an “elephant in a mousehole,”²² contrary to basic tenets of statutory construction, as well as to the principle that the FCC is an administrative agency of limited jurisdiction. “[A]dministrative agencies may [act] only pursuant to authority delegated to them by Congress,”²³ and an agency’s construction of a statute is unable to “survive judicial review if a contested regulation reflects an action that exceeds the agency’s authority.”²⁴

Further, an expansive reading of Section 615c(g) would raise serious non-delegation questions to the extent the Commission adhered to recommendations of the Advisory Committee in an effort to expand its jurisdiction. As the Commission has acknowledged in the past, “adopting [a committee’s] recommendations in their entirety, without

²² See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.”).

²³ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

²⁴ *Aid Ass’n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C.Cir.2003).

scrutiny, would result in an abdication of the Commission's statutory mandate under the Communications Act to act in the public interest."²⁵

The Commission Lacks Ancillary Authority to Regulate OTT Application Providers

The Commission similarly may not rely on ancillary jurisdiction to exercise authority over OTT messaging apps. The agency may exercise ancillary jurisdiction "when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."²⁶ The Commission has failed to identify any positive grant of authority to which its proposed assertion of jurisdiction would be reasonably ancillary. As in *Comcast*, the Commission would be relying on hortatory provisions without linking the "cited provisions to express delegations of regulatory authority."²⁷ Ancillary authority may not function as a "proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal" of a particular statute.²⁸

The FNPRM also fails to suggest how extending rules to OTT providers is necessary to further any statutory mandate. Instead, the Commission asks whether consumer protection or public safety goals, untethered from any specific statutory mandate, are a

²⁵ *In re The Commercial Mobile Alert System*, First Report and Order, 23 FCC Rcd 6144, ¶ 8 (2008) (discussing the role of the Commercial Mobile Service Alert Advisory Committee pursuant to the WARN Act). Congress "did not delegate Commission authority under the Communications Act to an advisory committee; on the contrary, the Commission was to conclude a 'proceeding' which necessarily implicates notice and an opportunity for public comment, and Commission discretion in adopting appropriate rules and requirements." *Id.*

²⁶ *Am. Library Ass'n*, 406 F.3d at 691-92.

²⁷ *Comcast*, 600 F.3d at 655.

²⁸ *EchoStar Satellite L.L.C. v. FCC*, 2013 U.S. App. LEXIS 913 (D.C. Cir. Jan. 15, 2013).

sufficient basis for extending CMRS rules to OTT providers.²⁹ Not only is such grasping for ancillary jurisdiction heedless of the need for a specific statutory foothold, but also it defies sound logic. As explained below, extending text-to-911 service requirements to OTT would create serious technical problems and cause consumer confusion. The impracticality of such a requirement would seal its illegality as a matter of Commission jurisdiction.

Requiring Text-to-911 Capability for OTT Providers Would Be Technically Infeasible

In addition to the jurisdictional arguments made above, TechAmerica believes that the Commission's proposed regulations requiring text-to-911 capability for OTT application providers particularly would be technically infeasible.

With respect to location identification capabilities, a messaging application may not contain any functionality that determines or utilizes the user's location. Furthermore, even if the app has such functionality, the user might not activate it or might turn it off. In any of these situations, the messaging application could not route a 911 message to the correct PSAP, nor could it provide a text-capable PSAP with information on the user's location.

To be usable for 911 messaging, OTT apps would need to (1) collect user location data or pull it from the mobile device's operating system or another application, and (2) override user attempts to disable that functionality. In short, OTT messaging would have to become—by regulatory fiat—a location-based app. This is especially problematic when a user disables the location feature of his mobile device to protect his

²⁹ FNPRM at ¶ 171.

privacy or to extend his device's battery life.

The versatility of OTT messaging applications presents an additional technical issue. OTT applications can be used on Wi-Fi-enabled devices, meaning that tower-location information will not necessarily be available. For example, a user might use the same messaging app on a 4G smart phone and Wi-Fi-only tablet. The devices might be made by the same manufacturer and have the same “look and feel.” From the user's perspective, there would be no evident difference between the phone messaging app and the tablet messaging app. But the tablet messaging app could not rely on network location data and might not have any other location feature enabled. The result would be confusion for the user—a situation that is particularly undesirable when a mobile or wired phone is likely to be immediately accessible in either the smartphone or Wi-Fi context.

Finally, non-interconnected text applications that provide closed communication are not able to connect to a PSAP at all. Those services should be entirely outside the scope of this proceeding.

Requiring Text-to-911 Capability for OTT Providers Is Unnecessary to Enable Effective Emergency Response

Unlike voice calls, messaging does not give instantaneous information whether the message has been received. It can leave a citizen stranded in an emergency if the message does not go through. For their part, 911 operators cannot easily obtain additional information that would assist first responders. TechAmerica believes that the use of messaging for 911 communications arguably should be affirmatively discouraged for all users who are able to place a voice call. As the Commission notes in its FNPRM,

text-based emergency messaging is no substitute for voice-based 911 service.³⁰

And while TechAmerica agrees with the Commission that Americans with disabilities who cannot make a voice call must be afforded a viable way to seek emergency help via text message, voluntary provisioning of 911 texting by wireless carriers and PSAPs reasonably fills the emergency-response need.

To be sure, unrealistic discussion of 911 messaging—including by the Commission itself—creates a risk to lives and property. It is not likely that consumers currently expect that their OTT texting application will connect them to emergency services. TechAmerica wholeheartedly supports the Commission’s educational efforts to inform consumers about the lack of ability to contact a PSAP via an OTT texting application. Currently, users may believe that most or all PSAPs are equipped to receive and respond to messages, when they are not.

The Commission should give focused attention to addressing confusion and risk surrounding texting to 911. If any regulatory obligation at all is required, the problem could be addressed in the OTT context by bounce-back notifications, generated within an OTT messaging app itself, that 911 messaging is not supported. Implementing OTT 911 texting capability is not necessary to avoid dangerous consumer confusion. Indeed, mandating such capability would do little if anything to solve the problem, especially as long as the vast majority of PSAPs are not ready to receive texts.

Moreover, where voice calling to 911 is available, most CMRS customers can text a 911-capable PSAP using the carrier service on their phone. And bounce-back notification is a lesser solution if regulatory intervention is deemed necessary and

³⁰ FNPRM at ¶18.

lawful.

Conclusion

TechAmerica appreciates the Commission's interest in this issue. Certainly, whenever lives are at stake the Commission must do all within its legal authority to enhance the public's safety.

However, for the reasons noted above, the Commission should refrain at this time from mandating text-to-911 regulations on CMRS and OTT application providers.